Filed 6/11/20 Truong v. Ly CA6

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IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

HAI TRUONG, Plaintiff and Respondent, v. HA LY, Defendant and Appellant.	H044919 (Santa Clara County Super. Ct. No. 1-13-CV-254614)

In 2005, respondent Hai Truong paid $2 million in deposits for eight commercial condominium units in a proposed development for which the developer, TWN Investment Group LLC (TWN), had not yet even acquired the land. The original contracts required the purchase and sale to be consummated by the end of 2006. These contracts expressly limited Truong's remedies to specific performance or termination of the contracts and refund of his deposits. In 2007, Truong and TWN executed extension agreements requiring the purchase and sale to be consummated by June 30, 2008. Construction had not even begun by June 30, 2008.

In November 2008, when TWN first obtained a construction loan, defendant Ha Ly, one of the principals in TWN, signed a guarantee agreeing to be personally liable for the return of deposits paid by buyers before 2008. The lender provided a line of credit to fund the return of buyer deposits. Although Phase 1 of the development was completed in 2010, Phase 2, which included Truong's units, was never built. In 2011, Truong unsuccessfully sought a return of his deposits. TWN filed for bankruptcy, and the

development was foreclosed upon. In 2013, Truong filed this action against Ly and others. The court found Ly liable to Truong under the guarantee for the return of his deposits.

On appeal, Ly contends that the trial court erroneously concluded that Truong's action was not barred by the four-year statute of limitations. He contends that Truong's action accrued no later than the date that Ly signed the guarantee because TWN was already in breach of the contracts at that time due to its failure to complete Truong's units by June 30, 2008. Truong contends that his action did not accrue until TWN refused his demand for refunds in 2011. We uphold the trial court's ruling in favor of Truong on this point. Ly also contends that, under the guarantee, he was not personally obligated to repay buyer deposits unless the lender's line of credit was first fully exhausted. Truong asserts that Ly's obligation was unconditional. We agree with the trial court that the obligation was unconditional. Consequently, we affirm the trial court's judgment.

I. Facts

TWN was the developer of a commercial condominium complex called Vietnam Town. The complex was planned to have 256 units in nine buildings plus a parking garage on a 19.5-acre site.[1] One of the buildings was planned to be a supermarket, while other units were planned to be restaurants or professional offices.

TWN was "just a name" and had no employees, income, or expenses. Lap Tang was one of the three original partners in TWN, and he was the main person involved in developing the Vietnam Town project, which was marketed exclusively to the Vietnamese community. Tang had previously successfully developed a nearby property

[1] Only the 115 units in Phase 1 were eventually built, and a significant number of those units never closed escrow.

into the Grand Century Shopping Mall. TWN planned to use deposits paid by early buyers to help finance the purchase of the land for Vietnam Town.

Tang and Truong had been friends for over 30 years. Truong owned a supermarket that catered to the Vietnamese community and was located very close to the planned Vietnam Town development. In February 2005, Truong entered into eight agreements with TWN and paid a total of $2 million in deposits for eight units, one of which was the building planned to be a supermarket. Truong borrowed some of the money to make these deposits. Truong dealt with Tang when he entered into these agreements. Truong could not read English, and his spoken English was "bad." Truong did not ask anyone to read the purchase agreements, which were in English, to him.

The TWN-Truong agreements stated that TWN "intends to have certain condominium units completed by December 31, 2006," but the agreements also acknowledged that TWN had not even purchased the real property let alone taken any action toward constructing the condominiums. The largest and most valuable condominium that Truong agreed to purchase, which was the supermarket unit, was priced at $12 million, and Truong paid a $1.5 million deposit for that unit. Because he was agreeing to purchase so much, Truong received "a very, very big discount." Others had to pay $400 per square foot, while he paid $300 per square foot. Tang believed that if Truong cancelled his agreements, those units could be resold for a higher price.

The agreements also provided: "IF THE SALE OF THE PROPERTY IS NOT CONSUMMATED *BY DECEMBER 31ST, 2006* AS INTENDED TO, DUE TO THE FAILURE OF ANY CONDITION PRECEDENT OR SELLER'S DEFAULT UNDER ARTICLE 2 HEREUNDER, THEN THE DEPOSIT SHALL BE RETURNED TO BUYER. BUYER AND SELLER FURTHER AGREE THAT DEPOSIT SHALL BE RETURNED IN FULL WITHOUT ANY DEDUCTION OF ANY AMOUNT FOR ANY DAMAGES CLAIMED BY SELLER OR ANY ADDITION OF ANY INTEREST, LOSS, OR DAMAGES WHATSOEVER CLAIMED BY BUYER. *RETURN OF*

DEPOSIT SHALL BE THE ONLY REMEDY THAT BUYER'S ENTITLED TO. IF THE SALE OF THE PROPERTY IS NOT CONSUMMATED BY DECEMBER 31ST, 2006 AS INTENDED . . . ." (Italics added.) The agreements also stated that "Time is of the essence in the performance of each of the parties' respective obligations contained herein."

The TWN-Truong agreements further provided: "The obligations of Seller are intended to be binding only on the property of Seller and the rents, issues and profits therefrom, or any substitutions thereof and neither Seller nor any of its partners, members, officers, employees, agents, attorneys or shareholders shall have any personal liability for any defaults under this Agreement. In addition, *should Seller default under this Agreement, Buyer's sole and exclusive remedies shall be to either seek specific performance of Seller's obligations under this Agreement or terminate this Agreement and receive back its Deposit and Additional Deposit*." (Italics added.)

In March 2005, TWN obtained an $18.6 million loan from United Commercial Bank (UCB) to help finance the purchase of the land, and TWN then purchased the land for Vietnam Town. Truong frequently passed by the proposed development, and he asked Tang when his units would be ready. Tang told him "that they were waiting for something, just wait." At the end of 2006, when the units had not been built by the original deadline, Truong did not seek a refund because he thought the units would be built.

By July 2007, the escrow account into which the buyers' deposits had been placed was empty. The funds had been used for site preparation. In September 2007, Truong and TWN entered into "extension" agreements in which they acknowledged that "Seller has not been able to complete the project" and agreed that "the time for completion is hereby extended to June 30, 2008." The extension agreements also subordinated Truong's interest to UCB's interest in the property. Tang told Truong that the extension agreements were needed "so that the bank would give him the loan." By May 2008,

Tang believed that buyers, like Truong, had "been VERY patient" but "need to see construction activities" and then would "sign anything we ask" because they "are very understanding, very confident in the project, very patient and very cooperative . . . ."

In November 2008, Ly purchased a 25 percent interest in Vietnam Town for $10 million, and TWN obtained a $31.14 million construction loan from UCB. This loan was enough to build only Phase 1 of the project. Truong's units were in Phase 2. UCB was not willing to loan TWN any money to construct Phase 2 until Phase 1 had been completed and fully sold and the construction loan for Phase 1 paid off. Tang, Ly, and Joseph Nguyen, another principal in TWN, signed the promissory note for the construction loan on behalf of TWN.

A condition of the construction loan was that Tang, Ly, and Nguyen personally guarantee payment of refunds to pre-2008 buyers who requested return of their deposits. Both the November 2008 construction loan agreement and the promissory note provided: "The Borrower and/or Guarantors shall be fully responsible for paying any and all Buyer deposit refunds as a result of sales cancellations for commercial condominium units sold prior to 1/1/08."

The requirement of a guarantee was an outgrowth of an agreement between UCB and Evertrust Bank for Evertrust to participate in financing the Vietnam Town development. Evertrust wanted to assure that buyer deposits would be refunded upon request, so its participation was conditioned on a $4 million line of credit being provided to fund requests for refunds. Although Evertrust never actually funded any portion of the project, UCB did extend a $4 million line of credit to Tang and Ly to fund repayment of buyer deposits.

In May 2009, Tang and Ly signed a "Guarantors' Agreement to Pay Buyer Deposit Refunds" in which they "acknowledge[d] and agree[d] to their obligation to refund certain purchase deposits identified below [including Truong's deposits] out of each Guarantor's personal funds after the [$4 million] Revolving Loan described below

has reached its Maximum Principal Balance." The May agreement's recitals stated that Tang and Ly had "agreed [in November 2008] to pay any refunds due prospective buyers of condominium units being developed at the Mortgaged Property who entered into purchase and sale agreements for such condominium units prior to January 1, 2008 (the 'Buyer Refunds')." "The Revolving Loan was made to provide a source of funds which [Tang and Ly] could use in order to pay Buyer Refunds." The recitals noted that all but $624,800 of the $4 million loan already had been disbursed and that $1,461,000 in requested Buyer Refunds remained unpaid.

The May 2009 agreement also provided: "1. The recitals set forth above are true and correct. [¶] 2. The Guarantors acknowledge and agree that each Guarantor is personally liable for the obligation of Borrower to pay the Buyer Refunds and further acknowledge and agree that, once the Maximum Principal Amount of the Revolving Loan is advanced, any amounts due and owing to buyers for Buyer Refunds will be the personal obligation of each Guarantor to pay from the personal funds of such Guarantor. [¶] 3. The obligations of the Guarantors under the Continuing Guaranties, including, without limitation to the obligation to pay the Buyer Refunds, *are absolute and unconditional*, and there exist no right of set off or recoupment, counterclaim or defense of any nature whatsoever to the obligations under the Continuing Guaranties." (Italics added.) It also provided: "This Agreement shall not be construed to . . . modify or amend the existing provisions of the [November 2008] Construction Loan Documents . . . ." Tang never told any of the buyers about the existence of the line of credit.

Eventually, Truong saw construction begin, but he noticed that his units were not under construction. He asked Tang, and Tang told him that "after he finish with this first area, then he will go to the second area." Truong asked when, but Tang offered no more information. Truong was "very disappointed." He kept asking Tang "when, when," and

Tang told him "be patient" and "[w]hen I get more money, there will be more." Tang told Truong that he would build Truong's units.

In 2009, UCB wanted TWN to have the buyers sign a second extension agreement changing the delivery date to 2009 for Phase 1 and 2010 for Phase 2. Tang had the Phase 1 buyers sign a second extension agreement. However, TWN told UCB that it would not ask the Phase 2 and 3 buyers to sign second extension agreements because that "would trigger additional refund requests from the Buyers since they do not know when the Phase 2 and 3 units would be completed because there is no Construction Loan for Phase 2 and 3 in place yet."

In October 2009, UCB was taken over by the Federal Deposit Insurance Corporation (FDIC), and its assets were transferred to East West Bank. Construction activity came to a halt. Three of the four buildings in Phase 1 had been completed before the FDIC takeover. When the FDIC took over UCB, the line of credit was frozen.

In October 2009, the line of credit had a balance of approximately $3.7 million. This line of credit "mature[d] December 5, 2009" but was not paid off by Tang or Ly. They never paid more than part of the interest on the line of credit. TWN defaulted, East West Bank declared the loan immediately due, and in January 2010 East West Bank gave notice of foreclosure. In April 2010, with the project not completed and the land and construction loans not repaid, East West Bank and TWN agreed to the appointment of a receiver to possess and control the property. After a lengthy delay, construction resumed, and Phase 1 was completed by the end of 2010. However, some Phase 1 buyers were unable to complete their purchases due to the financial crisis at that time.

Though Tang and Truong spoke frequently, Tang never told Truong that TWN was unlikely to be able to build Truong's units. After Phase 1's completion in 2010, Truong "kept waiting and waiting and waiting," and he "start[ed] feeling that he [(Tang)] might be defrauding me and he might not have the means to do the second phase."

Tang did not offer Truong a refund or tell him that there was a line of credit available to pay refunds.

Beginning in July 2011, Truong repeatedly asked Tang for a refund of his deposits because Truong needed to repay those he had borrowed from. "And every time, he just ask me to be patient, patient, patient." Tang told Truong "to please be patient" and that "he will try to find new investors to put money in" so that Truong could be repaid. Truong "trust[ed] [Tang] a lot" because Tang was "a very prominent businessman in the community and he has a few shopping centers." Truong asked Tang at least a half dozen times for a refund.

In 2012, Truong filed for bankruptcy, and he and his wife lost their home as a result. He was also forced to close his supermarket due to his lack of funds. Truong did not file an action seeking a refund of his deposits because he still believed that Tang "had a chance to build it" or "has the intention to pay me back." Truong filed this action only after he learned that Ly and Tang had signed a guarantee to repay the deposits.

East West Bank pursued foreclosure of the property. In February 2013, TWN filed for bankruptcy to stave off foreclosure on the property. In November 2013, East West Bank and Tang and Ly stipulated to settle a Los Angeles action brought by East West Bank against Tang and Ly.

II. Procedural Background

On October 16, 2013, Truong filed a breach of contract action against Tang and Ly. He sought a refund of his $2 million in deposits. Truong alleged that he was a third party beneficiary of the guarantees signed by Tang and Ly agreeing to repay the deposits TWN had received prior to 2008.

The case was tried to the court. Truong argued that his cause of action accrued in 2011 when he unsuccessfully requested a refund. He also asserted that equitable estoppel applied based on Tang's repeated reassurances that the project would be built soon and

that Truong should be patient. Ly argued that Truong's cause of action accrued on June 30, 2008, when the units were required to be delivered and were not. He contended that the evidence did not support an estoppel. Ly also claimed that the guarantee "never took effect" because it was predicated on the line of credit reaching its $4 million limit, which never happened.

A UCB employee testified at trial that the line of credit was intended to be a "secondary source" of repayment, with Tang and Ly personally being the primary source. Tang testified at trial that it was his understanding that he and Ly would be liable for refunds only after the $4 million line of credit was exhausted, and it was never exhausted. He testified that if any buyer asked him for a refund, he referred the buyer to Chicago Title, which was where deposit funds had originally been placed in an escrow account. Yet Tang insisted that the $4 million line of credit initiated in November 2008 (at the time of the construction loan for Phase 1) was solely for refunds of Phase 1 deposits. He claimed that only before that time was there a line of credit (granted around 2005 when UCB funded the land loan) that was available for Phase 2 refunds. Tang understood that when UCB funded the construction loan, it paid off the earlier line of credit and granted a new $4 million line of credit.

Xuan Huynh, another prospective Phase 2 buyer, testified at trial on behalf of Truong. She, like Truong, had agreed to purchase units in Vietnam Town that were in Phase 2. In 2004, she paid $360,000 in deposits for units that she intended to use for a restaurant. When her units were not built by the December 2006 deadline, she contacted the sales agent. He told her that the contract "is still valid until they deliver the unit" so she should "not worry about December 31st, 2006." The agent, Davin Nguyen, told her to "be patient, it's a big project, lot of work." In 2011, Huynh asked Tang for her deposits back because her units had not been built, and she had discovered that the property was being foreclosed upon and that TWN had filed for bankruptcy. Tang told her to "be patient" and that he was "working with the investor" to fund Phase 2

construction, which he said would take only four to six months to complete. Tang told her that the bank would not let any funds be withdrawn and that the foreclosure would not affect Phase 2 units. Tang also told Huynh that her money was still in escrow and would be "protected." Tang subsequently denied having told her that and said that her money had been used for construction of Phase 1. Huynh continued to ask for a refund, and Tang told her he did not have the money to give her. Tang did not tell her about the line of credit or that she should go to the escrow company to get her money refunded. He told her that her units would be built "very soon."

The trial court's statement of decision made numerous factual findings. It found that Tang had repeatedly told Truong to "be patient" and that his units would be constructed as soon as Phase 1 was completed. The court found that "Truong trusted Tang" because the two men had known each other for over 30 years. Because he trusted Tang, Truong signed the agreements even though he could not read English and did not know what the contracts said. It was not until July or August 2011 that Truong asked Tang for his money back. Tang again told Truong to "be patient."

The court found that Truong's cause of action did not accrue "on the last date stipulated for construction" because "the conduct of the parties" evidenced that Truong's entitlement to a refund of his deposits would accrue only upon Truong's termination of the agreements, his demand for return of his deposits, and TWN's refusal to return them. "The Court credits Truong's testimony that he demanded return of his deposits from Tang in July and August, 2011, and that Tang put him off." The court stated: "There is no question of equitable tolling or estoppel. The statute never ran." The court also expressly rejected Ly's assertion that "plaintiff's claim was conditioned on exhaustion of Tang and Ly's $4,000,000 line of credit." The court found that Truong's action was "based on the November 21, 2008 financing agreements, not on the May 5, 2009 Guarantors' Agreement[,] which merely restates Tang and Ly's earlier obligations to make refunds."

The court awarded Truong $2 million plus prejudgment interest of $1,134,429.21 and "costs of suit." The court entered judgment in accordance with its statement of decision. Ly timely filed a notice of appeal from the judgment.[2]

III. Discussion

A. Statute of Limitations

Ly argues that the undisputed evidence established that Truong's breach of contract cause of action accrued no later than when Ly assumed responsibility for refunding Truong's deposits in May 2009. Because this was more than four years before Truong filed this action in October 2013, Ly contends that the trial court erroneously concluded that Truong's action was not barred by the four-year statute of limitations.

Truong, on the other hand, contends that his cause of action did not accrue when TWN failed to perform in June 2008 or when Ly signed the guarantee in May 2009 but when Tang refused his request for a refund in July 2011, which was less than four years before he filed his action. He maintains that the trial court's construction of the contracts must be upheld because the court's interpretation was based on its assessment of disputed extrinsic evidence. Truong asserts that his cause of action did not accrue under the language of the contracts until he acted to terminate the contracts by demanding a refund because until that point he "did not incur damages."

The limitations period for an action for breach of a written contract is four years. (Code Civ. Proc., § 337, subd. (a).) "The limitations period, the period in which a plaintiff must bring suit or be barred, runs from the moment a claim accrues. [Citations.] Traditionally at common law, a 'cause of action accrues "when [it] is complete with all of its elements"—those elements being wrongdoing, harm, and causation.' [Citations.] This is the 'last element' accrual rule: ordinarily, the statute of limitations runs from 'the

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[2] Tang also appealed, but he dismissed his appeal prior to briefing.

occurrence of the last element essential to the cause of action.' [Citations.]" (*Aryeh v. Canon Business Solutions, Inc*. (2013) 55 Cal.4th 1185, 1191-1192.) "[T]he elements of a cause of action for breach of contract are (1) the existence of the contract, (2) plaintiff's performance or excuse for nonperformance, (3) defendant's breach, and (4) the resulting damages to the plaintiff." (*Oasis West Realty, LLC v. Goldman* (2011) 51 Cal.4th 811, 821.)

While it is true that TWN breached the contracts by failing to complete Truong's units by June 30, 2008, the trial court could have reasonably concluded that Truong's cause of action did not accrue at the time of that breach or at the time of the execution of the guarantee.[3] The trial court could have so found because, under the express language of the contracts' limitation of remedies clause, the last element of Truong's breach of contract cause of action—damages—had not yet occurred as he did not have *any recoverable damages* at the time of breach or at the time of execution of the guarantee. The contracts provided that "*RETURN OF DEPOSIT SHALL BE THE ONLY REMEDY THAT BUYER'S ENTITLED TO*" and that, "should Seller default under this Agreement, Buyer's sole and exclusive remedies shall be to either seek specific performance of Seller's obligations under this Agreement or *terminate this Agreement and receive back its Deposit and Additional Deposit*." (Italics added.)

A breach of contract cause of action does not accrue until *all* of the elements of the cause of action are present. Here, the evidence supports the trial court's conclusion that the damages element of the cause of action did not exist prior to July 2011, when TWN

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[3] Since the guarantee was a third party beneficiary contract, if the underlying contracts were breached before the guarantor entered into the guarantee, then the breach occurred on the date the guarantor executed the guarantee. (*Bogart v. George K. Porter Co*. (1924) 193 Cal. 197, 201-202.) If the underlying contracts were breached after the guarantee was executed, the date of breach of the underlying contracts was the same as the date of breach of the guarantee. (*Ibid*.)

refused to return Truong's deposits, because the contracts provided that Truong's "sole and exclusive" remedy for breach was "to . . . terminate this Agreement and receive back [his] Deposit . . . ." Truong did not terminate the contracts or demand a refund until July 2011, less than four years prior to bringing this action. Since he initiated this action within four years after he first suffered recoverable damages, the trial court did not err in finding that the statute of limitations did not bar his action.

Ly resists this analysis and insists that a breach of contract cause of action accrues at the time of breach except under circumstances not present here, such as anticipatory breach or a contract with ongoing obligations. He cites *Romano v. Rockwell Internat., Inc.* (1996) 14 Cal.4th 479 (*Romano*) for the proposition that "a cause of action for breach of contract accrues at the time of breach." However, what the California Supreme Court actually said in *Romano* was that "[a] cause of action for breach of contract *does not accrue* ***before*** *the time of breach*." (*Romano*, at p. 488, italics and boldface added.) That is obviously true; without breach, a breach of contract cause of action cannot accrue. However, unlike here, *Romano*, an employment termination case, did not involve a contract with a limitation of remedies clause that created the possibility that even at the time of a breach there might not be any recoverable damages. The same is true as to Ly's reliance on *McCaskey v. California State Automobile Assn.* (2010) 189 Cal.App.4th 947, another employment case, and *Professional Collection Consultants v. Lauron* (2017) 8 Cal.App.5th 958, an action to recover credit card debt, both decisions of this court. Neither of these cases concerned a contract that limited remedies so that it was possible for no recoverable damages to have occurred at the time of breach. While a breach *usually* immediately results in the accrual of a breach of contract cause of action, that is true only because a breach *usually* immediately results in recoverable damages. In this case, the contracts' express limitation of remedies meant that a breach would not necessarily immediately cause any recoverable damages.

Ly claims that *Boon Rawd Trading Intern. Co., Ltd. v. Paleewong Trading Co.* (N.D. Cal. 2010) 688 F.Supp.2d 940 (*Boon Rawd*) is "right on point." It is not. In that case, the plaintiff argued that the federal district court should "toll the statute of limitations *indefinitely* until the date [the plaintiff] elected to treat the breach as terminating the contract." (*Id.* at p. 949.) The federal district court rejected that argument: "If this were really the rule, had BRTI not terminated the contract itself in 2009, PTC could have waited fifty years before filing this action, and would be entitled to the full fifty years worth of damages. This is not the law in California, and not the rule contemplated by *Romano*. It would lead to absurd and inequitable results." (*Ibid.*) Unlike the situation in *Boon Rawd*, the issue here is not whether the statute of limitations was *tolled* but whether Truong's cause of action accrued before he had suffered any recoverable damages. The federal district court did not consider any such argument in *Boon Rawd*. Hence, *Boon Rawd* is not "right on point."

Ly argues that Truong was necessarily damaged by TWN's failure to provide him with a refund immediately after June 30, 2008 because TWN was obligated to deliver either the units or a refund by that date. He asserts that TWN breached the contracts by failing to provide a refund and that this breach immediately caused Truong recoverable damages. Ly insists that the contracts in this case were "plain and unambiguous" in this respect, so the court could not properly consider extrinsic evidence in interpreting the contract language. We disagree.

The express language of the contracts is at best ambiguous as to whether TWN had an affirmative obligation to provide a refund absent a buyer's termination of the contract and request for a refund. One portion of the contracts provided: "IF THE SALE OF THE PROPERTY IS NOT CONSUMMATED BY DECEMBER 31, 2006 . . . , THEN THE DEPOSIT SHALL BE RETURNED TO BUYER." (Italics added.) However, another portion of the contracts provided: "[S]hould Seller default under this Agreement, Buyer's sole and exclusive remedies shall be to either seek specific

performance of Seller's obligations under this Agreement or *terminate this Agreement and receive back its Deposit* and Additional Deposit."[4] (Italics added.) Based solely on the contracts' express language, it was unclear whether the contracts obligated TWN to return a buyer's deposit immediately upon TWN's failure to deliver the units by the scheduled delivery date or alternatively the buyer was entitled to a return of the deposit only if the buyer elected to "terminate this Agreement and receive back its deposit . . . ."

Because the contracts were ambiguous on this point, the trial court could properly consider extrinsic evidence in resolving the ambiguity. "The test of admissibility of extrinsic evidence to explain the meaning of a written instrument is not whether it appears to the court to be plain and unambiguous on its face, but whether the offered evidence is relevant to prove a meaning to which the language of the instrument is reasonably susceptible." (*Pacific Gas & E. Co. v. G. W. Thomas Drayage etc. Co.* (1968) 69 Cal.2d 33, 37.) "A party's conduct occurring between execution of the contract and a dispute about the meaning of the contract's terms may reveal what the parties understood and intended those terms to mean. For this reason, evidence of such conduct . . . is admissible to resolve ambiguities in the contract's language." (*City of Hope National Medical Center v. Genentech, Inc.* (2008) 43 Cal.4th 375, 393.) "[W]here extrinsic evidence has been properly admitted as an aid to the interpretation of a contract and the evidence conflicts, a reasonable construction of the agreement by the trial court which is supported by substantial evidence will be upheld."[5] (*In re Marriage of Fonstein* (1976) 17 Cal.3d 738, 746-747.)

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[4] Ly minimizes the importance of this contractual provision, characterizing it as "merely prescrib[ing] the procedural method for a buyer to pursue a remedy" for breach. The trial court could reasonably interpret this language in conjunction with the remainder of the contract as a limitation of remedies provision that controlled when Truong would suffer recoverable damages.

[5] We reject Ly's claim that we exercise independent review on appeal.

Here, evidence of the parties' course of conduct between the execution of the contracts and the time when the dispute arose reflected that neither TWN nor Truong understood the contracts to affirmatively obligate TWN to return deposits immediately upon the passing of the original December 2006 delivery date or the extended June 2008 delivery date absent a buyer's termination of the contracts and request for a refund. The December 2006 delivery date passed without refunds being offered or paid, and the Phase 2 buyers subsequently signed extension agreements giving TWN until June 2008. That date too passed without refunds being offered or paid. Thus, the evidence presented at trial reflected that both TWN and the Phase 2 buyers were operating under the same understanding of the contracts: a refund was available to a buyer only if the buyer terminated the contract and requested a refund. Truong did not request a refund until July 2011 because, until then, he remained committed to purchase the units that TWN remained contractually obligated to deliver to him. This evidence supported the trial court's finding that the contracts did not affirmatively obligate TWN to refund deposits until a buyer terminated the contract and demanded a refund. Consequently, the trial court properly found that Truong's cause of action did not accrue until July 2011, when he realized that TWN was never going to deliver the units and demanded a refund of his deposits.

Ly relies on this court's decision in *Tin Tin Corp. v. Pacific Rim Park, LLC* (2009) 170 Cal.App.4th 1220 (*Tin Tin*), but that decision, like the others upon which he relies, did not involve a contract that expressly limited remedies so as to prevent damages from occurring at the time of the breach. In *Tin Tin*, the landlord sued a tenant, who was obligated under the lease to remodel the premises no later than March 31, 2000. (*Tin Tin*, at p. 1232.) The remodeling had not even commenced by that date. (*Ibid.*) Over the next several years, the landlord continued to ask the tenant to complete the remodel, but the landlord did not file an action against the tenant for breach of contract until December 2005, more than four years after the breach. (*Id.* at pp. 1232, 1234.)

The trial court found that the statute of limitations barred the landlord's breach of contract action against the tenant because the landlord had failed to file its action within four years of the March 31, 2000 deadline. (*Tin Tin, supra,* 170 Cal.App.4th at p. 1233.) On appeal, the landlord claimed that a 2002 letter it sent to the tenant had extended the time for completion of the remodel, thereby extending the limitations period. This court rejected that claim. Since the intent of the letter was disputed at trial, this court found that the trial court's decision was supported by substantial evidence. (*Id*. at p. 1234.) This court's *Tin Tin* decision provides no support for Ly's argument here. The issue in *Tin Tin* did not turn on a limitation of remedies provision but on a claim that a subsequent writing had extended the time for completion, an issue that is not before us in this case. This court in *Tin Tin* upheld a trial court's resolution of disputed factual issues, as we do in this case.

Ly also complains that a holding that accrual did not occur until Truong demanded a refund would permit Truong to delay the commencement of the limitations period indefinitely. Truong was not responsible for the circumstances that led to the delayed accrual of his cause of action. The contracts' limitation of remedies clause, drafted by TWN to protect itself (and ultimately Ly) from potentially greater liability, was responsible for the fact that Truong's cause of action did not accrue until he demanded and was denied a refund of his deposits. It is the contracts' limitation of remedies clause that distinguishes the situation before us from the cases cited by Ly in which the limitations period is deemed to have commenced to run because " 'a right has fully accrued except for some demand to be made as a condition precedent to legal relief.' " (*Taketa v. State Board of Equalization* (1951) 104 Cal.App.2d 455, 460.) Here, Truong's cause of action had *not* "fully accrued" because he had suffered no recoverable damages until TWN refused his demand for a refund of his deposits.

The trial court's determination that Truong's breach of contract cause of action was not barred by the statute of limitations is supported by substantial evidence, so we must uphold it.

B. Guarantee was Not Conditioned On Exhaustion of Line of Credit

Ly contends that his personal guarantee to repay buyer deposits was conditional, that he was not obligated to personally repay buyer deposits unless and until the $4 million line of credit was fully exhausted, and that, because the line of credit was never fully exhausted, he had no personal obligation to repay Truong's deposit.

"The interpretation of a written instrument, even though it involves what might properly be called questions of fact [citation], is essentially a judicial function to be exercised according to the generally accepted canons of interpretation so that the purposes of the instrument may be given effect. [Citations.] Extrinsic evidence is 'admissible to interpret the instrument, but not to give it a meaning to which it is not reasonably susceptible' [citations], and it is the instrument itself that must be given effect. [Citations.] It is therefore solely a judicial function to interpret a written instrument unless the interpretation turns upon the credibility of extrinsic evidence. Accordingly, 'An appellate court is not bound by a construction of the contract based solely upon the terms of the written instrument without the aid of evidence [citations], where there is no conflict in the evidence [citations], or a determination has been made upon incompetent evidence [citation].' [Citations.]" (*Parsons v. Bristol Development Co*. (1965) 62 Cal.2d 861, 865-866.)

Ly's claim founders on the express language of both the November 2008 guarantee and the May 2009 guarantee. The November 2008 guarantee did not condition Ly's obligation in any way and did not mention the line of credit. It provided: "The Borrower and/or Guarantors shall be fully responsible for paying any and all Buyer deposit refunds as a result of sales cancellations for commercial condominium units sold

prior to 1/1/08." The May 2009 guarantee agreement provided that Ly's obligations under the guarantee "including, without limitation to the obligation to pay the Buyer Refunds, *are absolute and unconditional*." (Italics added.) And the May 2009 guarantee also expressly provided that it "shall not be construed" to "modify or amend" the November 2008 guarantee.

Ly bases his argument on two sentences in the May 2009 guarantee that he claims "modified" the November 2008 guarantee to make his obligation conditional on exhaustion of the line of credit. One is the introductory sentence of the May 2009 agreement, which states that "Guarantors acknowledge and agree to their obligation to refund certain purchase deposits identified below out of each Guarantor's personal funds after the Revolving Loan described below has reached its Maximum Principal Balance." The other sentence, which appears just before the "absolute and unconditional" language and is followed a few lines later by the "shall not be construed" to "modify" language, states: "The Guarantors acknowledge and agree that each Guarantor is personally liable for the obligation of Borrower to pay the Buyer Refunds and further acknowledge and agree that, once the Maximum Principal Amount of the Revolving Loan is advanced, any amounts due and owing to buyers for Buyer Refunds will be the personal obligation of each Guarantor to pay from the personal funds of such Guarantor."

Ly's claim that these two sentences "modified" the November 2008 guarantee cannot be reconciled with the express language of the May 2009 agreement providing that it "shall not be construed to . . . modify or amend the existing provisions of the [November 2008] Construction Loan Documents . . . ." In his reply brief, Ly attempts to avoid this problem by arguing that honoring the May 2009 agreement's explicit statement that it does not modify the November 2008 guarantee "violates a cardinal rule of contract interpretation." The "cardinal rule" he cites is Civil Code section 1641, which provides: "The whole of a contract is to be taken together, so as to give effect to every part, if reasonably practicable, each clause helping to interpret the other." (Civ. Code, § 1641.)

Civil Code section 1641 applies only where " 'reasonably practicable,' " and it may not be utilized to produce an unreasonable conclusion. (*Beverly Hills Oil Co. v. Beverly Hills Unified School Dist.* (1968) 264 Cal.App.2d 603, 610.) Here, a consideration of the "whole" of the November 2008 and May 2009 guarantees "taken together" unerringly reflects that Ly's obligation to refund buyer deposits was intended to be "absolute and unconditional" and that the May 2009 agreement was *not* intended to "modify" Ly's unconditional obligation under the November 2008 guarantee to add a condition. The language relied upon by Ly may be reasonably interpreted and "give[n] effect" as something other than a condition. The only evidence of UCB's intent in connection with that language was evidence that the line of credit was intended to provide a "secondary source" or "Back-Up source of funding" for repayment of buyer deposits. The contract language is therefore reasonably understood as an expression of UCB's intent not to increase the line of credit, rather than as any kind of condition on Ly's obligations.

The structure of the sentence upon which Ly relies is consistent with such an interpretation. The initial clause of the sentence states Ly's unconditional obligation: He "is personally liable for the obligation of Borrower to pay the Buyer Refunds." Only *after* stating that *unconditional* obligation does the sentence state "and further," indicating that this is an *additional* obligation (not a condition), that Ly "acknowledge[s] and agree[s] that, once the [$4 million line of credit] is advanced, any amounts due and owing to buyers for Buyer Refunds will be the personal obligation of each Guarantor to pay from the personal funds of such Guarantor." The most reasonable construction of this language is that Ly is acknowledging that UCB will extend no further credit to him beyond the $4 million. So understood, this sentence, consistent with Civil Code section 1641, is given full effect.

The trial court did not err in finding that Ly's personal guarantee to repay buyer deposits was not subject to a condition precedent.

IV. Disposition

The judgment is affirmed.

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Mihara, J.

WE CONCUR:

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Elia, Acting P. J.

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Bamattre-Manoukian, J.